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No. 99-1758

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1999

DELAWARE RIVER PORT AUTHORITY,

Petitioner,

–v.–

FRATERNAL ORDER OF POLICE,
PENN-JERSEY LODGE 30 and JOSEPH VENA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

BRIEF OF *AMICI CURIAE* THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY and THE WATERFRONT COMMISSION OF NEW YORK HARBOR IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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31pp

TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of the *Amici Curiae* 1

Statement of the Case 3

Summary of Argument 3

Reasons for Granting the Petition 4

I. The Determination Of The Appellate Division That An Interstate Compact Agency May Be Regulated By The Legislation Of One Parent State In The Absence Of Concurrence By All Other Parent States Is Contrary To The Contractual Nature Of Interstate Compact Agencies 4

A. Interstate Compacts Are Contractual In Nature And Interstate Compact Agencies Should Not Be Regulated By The Legislation Of One Parent State In The Absence Of Concurrence By All Other Parent States 5

B. The Compact Legislation Governing Petitioner And *Amici Curiae* Require Concurrent Legislation Of The Respective Parent States To Affect Petitioner And *Amici Curiae* 6

1. DRPA Legislation 6

2. Port Authority Legislation 8

3. Waterfront Commission Legislation 11

TABLE OF CONTENTS

Page

II. The Determination Of The Appellate Division That An Interstate Compact Agency May Be Regulated By The Legislation Of One Parent State In The Absence Of Mutual Concurrence By All Parent States Is Contrary To The Law Of New Jersey's Partner States In Creating Petitioner And The *Amici Curiae* 13

III. Review Of The Appellate Division Decision Is Necessary To Avoid Confusion As To The State Law Applicable To Interstate Compact Agencies Because Of Conflicts Among The Courts Of The States Who Are Party To The Compacts Creating The DRPA And The *Amici Curiae* With Respect To Whether Mutual Concurrence Is Necessary For Interstate Compact Agencies To Be Regulated By Generally Applicable State Law 15

Conclusion 20

TABLE OF AUTHORITIES

Page

Cases:

Cuyler v. Adams, 449 U.S. 433 (1981) 17

Delaware River Joint Toll Bridge Comm'n v. Colburn, 310 U.S. 419 (1940) 17

Dezaio v. Port Authority, 205 F.3d 62 (2d Cir. 2000) 17

Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30 (1994) 5, 9-10, 17

Int'l Union of Operating Engineers, Local 68 v. Delaware River and Bay Authority, 147 N.J. 433, 688 A.2d 569, *cert. denied*, 522 U.S. 861 (1997) 17, 18 n.5, 19

King v. Port Authority, 909 F. Supp. 938 (D.N.J. 1995), *aff'd*, 106 F.3d 385 (1996) 18, 18 n.5

Malverty v. Waterfront Comm'n, 71 N.Y.2d 977, 529 N.Y.S.2d 67, 524 N.E.2d 421 (1988) 14

Nardi v. Delaware River Port Authority, 88 Pa. Commw. 558, 490 A.2d 949 (1985) 14-15

Pilla v. Delaware River Port Authority, 1999 WL 345918 (E.D. Pa. May 7, 1999) 17

State ex rel. Dyer v. Sims, 341 U.S. 22 (1951) 4, 5, 13, 18

TABLE OF AUTHORITIES

Page

Statutes:

United States

42 U.S. Stat. 174 (1921)..... 1

67 U.S. Stat. 541 (1953)..... 1

New Jersey

N.J. Stat. Ann. §32:1-1 (West 1990)..... 1, 8

N.J. Stat. Ann. §32:1-3 (West 1990)..... 1

N.J. Stat. Ann. §32:1-4 (West 1990)..... 9

N.J. Stat. Ann. §32:1-8 (West 1990)..... 9

N.J. Stat. Ann. §32:1-35.27a (West 1990)..... 10

N.J. Stat. Ann. §32:1-35.36 (West 1990)..... 10

N.J. Stat. Ann. §32:1-35.61 (West 1990)..... 10

N.J. Stat. Ann. §32:1-35.68 (West 1990)..... 10

N.J. Stat. Ann. §32:1-35.93 (West 1990)..... 10

N.J. Stat. Ann. §32:1-119.3 (West 1990)..... 10

N.J. Stat. Ann. §32:1-140 (West 1990)..... 11

N.J. Stat. Ann. §32:1-140.7 (West 1990)..... 10

TABLE OF AUTHORITIES

Page

Statutes:

N.J. Stat. Ann. §32:1-142 (West 1990) 10

N.J. Stat. Ann. §32:1-146 (West 1990) 10

N.J. Stat. Ann. §32:1-154.17 (West 1990) 11

N.J. Stat. Ann. §32:1-154.24 (West 1990) 11

N.J. Stat. Ann. §32:1-156 (West 1990) 11

N.J. Stat. Ann. §32:1-168 (West 1990) 11

N.J. Stat. Ann. §32:1-174 (West 1990) 11

N.J. Stat. Ann. §32:1-176 (West 1990) 11

N.J. Stat. Ann. §32:3-1 (West 1990) 6, 7, 8

N.J. Stat. Ann. §32:3-2 (West Supp. 1999) 6, 7

N.J. Stat. Ann. §32:3-3 (West Supp. 1999) 7

N.J. Stat. Ann. §32:3-4 (West Supp. 1999) 4

N.J. Stat. Ann. §32:3-4 to -5, -13, -13.23 (West Supp. 1999) 7

N.J. Stat. Ann. §32:3-5(e) (West Supp. 1999) 7

N.J. Stat. Ann. §32:3-13.41, -13.49 (West 1990) 8

N.J. Stat. Ann. §32:4-6 (West 1990 & Supp. 1999) 8

N.J. Stat. Ann. §32:4-9 (West 1990) 8

TABLE OF AUTHORITIES

Page

Statutes:

N.J. Stat. Ann. §32:23-2 to -4 (West 1990) 2, 11

N.J. Stat. Ann. §32:23-6 (West 1990) 2, 2 n.2, 11, 12

N.J. Stat. Ann. §32:23-8 (West 1990) 11

N.J. Stat. Ann. §32:23-9 (West 1990) 11

N.J. Stat. Ann. §32:23-11 (West 1990) 11

N.J. Stat. Ann. §32:23-23.1 (West Supp. 1999) 12

N.J. Stat. Ann. §32:23-70 (West 1990) 11

N.J. Stat. Ann. §32:23-75 (West 1990) 12

N.J. Stat. Ann. §32:23-77 (West 1990) 12

N.J. Stat. Ann. §32:23-78 (West 1990) 12

N.J. Stat. Ann. §32:23-84 (West 1990) 12

N.J. Stat. Ann. §32:23-85 to -86 (West 1990) 12

N.J. Stat. Ann. §32:23-104 (West 1990) 12

N.J. Stat. Ann. §32:23-105.1 (West Supp. 1998) 12

N.J. Stat. Ann. §32:23-108 (West 1990) 12

N.J. Stat. Ann. §32:23-113 (West 1990) 12

N.J. Stat. Ann. §32:23-114 (West 1990 & Supp. 1999) 12

TABLE OF AUTHORITIES

Page

Statutes:

N.J. Stat. Ann. §32:23-117 (West 1990)..... 12

32 N.J. Stat. Ann., Ch. 8 (West 1990)..... 16 n.4

32 N.J. Stat. Ann., Ch. 11E (West 1990)..... 16 n.4

32 N.J. Stat. Ann., Ch. 14 (West 1990)..... 16 n.4

32 N.J. Stat. Ann., Ch. 19 (West 1990)..... 16 n.4

32 N.J. Stat. Ann., Ch. 20 (West 1990)..... 16 n.4

32 N.J. Stat. Ann., Ch. 21 (West 1990)..... 16 n.4

32 N.J. Stat. Ann., Ch. 22B (West 1990)..... 16 n.4

32 N.J. Stat. Ann., Ch. 27 (West 1990)..... 16 n.4

32 N.J. Stat. Ann., Ch. 29 (West 1990)..... 16 n.4

1921 N.J. Laws, Ch. 151..... 1

1953 N.J. Laws, Ch. 202..... 1

New York

N.Y. Unconsol. L. §6401 (McKinney 1979)..... 1, 8

N.Y. Unconsol. L. §6403 (McKinney 1979)..... 1

TABLE OF AUTHORITIES

Page

Statutes:

N.Y. Unconsol. L. §6404 (McKinney 1979) 9

N.Y. Unconsol. L. §6408 (McKinney 1979) 9

N.Y. Unconsol. L. §6525 (McKinney 1979) 10

N.Y. Unconsol. L. §6601 (McKinney 1979) 10

N.Y. Unconsol. L. §6631 (McKinney Supp. 1999) 10

N.Y. Unconsol. L. §6647 (McKinney 1979) 10

N.Y. Unconsol. L. §6678 (McKinney 1979) 10

N.Y. Unconsol. L. §6817 (McKinney 1979) 11

N.Y. Unconsol. L. §6837 (McKinney 1979) 11

N.Y. Unconsol. L. §6932 (McKinney 1979) 11

N.Y. Unconsol. L. §6973 (McKinney 1979) 10

N.Y. Unconsol. L. §7058 (McKinney 1979) 10

N.Y. Unconsol. L. §7112 (McKinney 1979) 11

N.Y. Unconsol. L. §7136 (McKinney 1974) 11

N.Y. Unconsol. L. §7142 (McKinney Supp. 1999) 11

N.Y. Unconsol. L. §7192 (McKinney 1979) 10

N.Y. Unconsol. L. §§9802-3 (McKinney 1979) 2, 11

TABLE OF AUTHORITIES

Page

Statutes:

N.Y. Unconsol. L. §9806 (McKinney 1979) 2, 11

N.Y. Unconsol. L. §9811 (McKinney 1979) 11

N.Y. Unconsol. L. §9870 (McKinney 1979) 11

N.Y. Unconsol. L. §9907 (McKinney 1979) 12

N.Y. Unconsol. L. §9920 (McKinney Supp. 1999) 12

N.Y. Unconsol. L. §9922 (McKinney Supp. 1999) 12

N.Y. Unconsol. L. §9924 (McKinney Supp. 1999) 12

N.Y. Unconsol. L. §9925 (McKinney Supp. 1999) 13

N.Y. Unconsol. L. §9931 (McKinney 1979) 12

N.Y. Unconsol. L. §9937 (McKinney 1979) 12

1921 N.Y. Laws, Ch. 154 1

1953 N.Y. Laws, Ch. 882 2

Pennsylvania

Pa. Stat. Ann. tit. 36, §3503, Preamble (Supp. 2000) 6, 7, 8

Pa. Stat. Ann. tit. 36, §3503, Art I (Supp. 2000) 6

Pa. Stat. Ann. tit. 36, §3503, Art II (Supp. 2000) 7

TABLE OF AUTHORITIES

Page

Statutes:

Pa. Stat. Ann. tit. 36, §3503, Art III (Supp. 2000) 4, 7

Pa. Stat. Ann. tit. 36, §3503, Art IV (Supp. 2000)..... 7

Pa. Stat. Ann. tit. 36, §3503-3503.9 (Supp. 2000)..... 8

Pa. Stat. Ann. tit. 36, §3504.1-3504.1a (Supp. 2000)..... 8

INTEREST OF THE *AMICI CURIAE*[1]

The Port Authority of New York and New Jersey ("the Port Authority") is a body corporate and politic created in 1921 by a Congressionally-consented-to compact between the States of New York and New Jersey, pursuant to Article I, Section 10 of the United States Constitution, to develop public transportation, terminal, and other facilities of commerce within the statutorily defined Port District. 42 U.S. Stat. 174 (1921), consenting to 1921 N.J. Laws, Ch. 151 (codified at N.J. Stat. Ann. §§32:1-1 to -24 (West 1998 & Supp. 1998)) and 1921 N.Y. Laws, Ch. 154. (codified at N.Y. Unconsol. Ł. §§6401-6423 (McKinney 1979 & Supp. 1998)).

The Port District comprises an area of approximately 1,500 square miles centering around New York harbor. *See*, N.J. Stat. Ann. §32:1-3 (West 1990); N.Y. Unconsol. L. §§6403 (McKinney 1979). At the present time, pursuant to the 1921 Compact, and subsequent bi-State legislation, the Port Authority owns and operates thirty three (33) such facilities, including two tunnels and four bridges between the States of New York and New Jersey, four airports, a heliport, the World Trade Center, and six marine terminals.

The Waterfront Commission of New York Harbor ("the Waterfront Commission") is a body corporate and politic created in 1953 by a Congressionally-consented-to compact between the States of New York and New Jersey, pursuant to Article I, Section 10 of United States Constitution. 67 U.S. Stat. 541 (1953), consenting to 1953 N.J. Laws, Ch. 202, as amended

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[1] In compliance with Rule 37.2(a), the Court is advised that the parties herein have consented to the submission of a brief *amici curiae* by The Port Authority of New York and New Jersey and The Waterfront Commission of New York Harbor as set forth in letters on file with the Court.

In compliance with Rule 37.6, the Court is advised that this brief *amici curiae* was authored wholly by counsel whose names are set forth hereon, and no monetary contribution was received from any other party in connection with the preparation or submission thereof.

by Ch.203 (codified at N.J. Stat. Ann. §§32:23-1 *et seq.* (West 1990 & Supp. 1998)), and 1953 N.Y. Laws Ch. 882, as amended by Ch. 883 (codified at N.Y. Unconsol. L. §§9801 *et seq.* (McKinney 1979 & Supp. 1998)). The Waterfront Commission was created for the purpose of eliminating racketeering and other criminal, corrupt and evil conditions on the waterfront within the Port District created by the Port Authority legislation. N.J. Stat. Ann. §§32:23-2 to -4, -6[2] (West 1990); N.Y. Unconsol. L. §§9802-3, 9806 (McKinney 1979).

The Port Authority and the Waterfront Commission respectfully urge the Court to grant the Petition for Certiorari of the Delaware River Port Authority ("DRPA") herein to review a decision of the New Jersey Superior Court, Appellate Division, because that decision ignores the carefully considered methods set forth in the DRPA Compact for imposing duties and obligations on that agency, establishes a precedent that conflicts with the decisions of other states and is harmful to other Compact Clause entities by imposing duties and obligations by inference. The rule of decision applied by the Appellate Division decision is inconsistent with the nature of an interstate compact agency, whose conduct should be regulated only when all parent states express an intent to do so. Moreover, the decision creates confusion as to the rule of decision to be followed to determine the effect of state legislation on interstate Compact Clause agencies.

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[2] Reference is made to the first version of N.J. Stat. Ann. §32:23-6 (West 1990). New Jersey Statutes Annotated contain two versions of N.J. Stat. Ann. §32:23-6 (West 1990) and other sections of Waterfront Commission legislation because New York and New Jersey adopted amendatory legislation in 1970 relating to airports, which provided that such legislation would not be effective if not approved by Congress, and Congress has not approved such legislation. See note under N.J. Stat. Ann. §32:23-6 (West 1990). McKinney's Consolidated Laws of New York Annotated presents the Waterfront Commission legislation incorporating the 1970 amendments. Accordingly, hereinafter, unless otherwise specified, citation is made to the first version of a section in New Jersey Statutes Annotated if there are two versions of a section. No parallel citation will be made of a corresponding section in McKinney's Consolidated Laws of New York Annotated if it is set forth therein as amended by the 1970 legislation.

As Compact Clause agencies formed by New Jersey and New York, the *Amici Curiae* have an interest in the resolution of these issues by this Court in a decision that recognizes the contractual nature of interstate compact agencies, and removes confusion as to the applicability of state legislation to them in the absence of express mutual agreement of the parent states providing for such applicability.

STATEMENT OF THE CASE

Amici Curiae adopt the statement of the case as set forth in the Petition submitted by the DRPA.

SUMMARY OF ARGUMENT

This Court should grant the Petition for Writ of *Certiorari* to the Appellate Division of the New Jersey Superior Court because this case presents an issue of federal law under the United States Constitution that has national importance: Whether agencies created by the States pursuant to agreements made pursuant to the Compact Clause may be regulated by the law of one state in absence of mutual concurrence by the other parent state or states that the Compact Clause agency may be so regulated. The Appellate Division has ruled that a Compact Clause agency may be regulated by the law of one state in the absence of mutual concurrence by the other parent state or states. In so ruling, the Appellate Division has ignored the contractual nature of Compact Clause agencies, and their purpose of addressing regional problems without regard to state boundaries, free from individual state control. Thus, the Appellate Division decision, if unchallenged, will reduce the effectiveness of Compact Clause agencies within New Jersey, and elsewhere if the decision is followed as precedent.

In addition, review by this Court of the decision of the Appellate Division is necessary to resolve confusion as to law applicable to interstate compact agencies. First, the rule to determine which state legislation applies to a New Jersey interstate compact agency varies among New Jersey and the

other States who are party to the compacts creating the DRPA and the *Amici Curiae*. Second, the rule followed by the Appellate Division itself engenders confusion as to the law applicable to interstate compact agencies.

REASONS FOR GRANTING THE PETITION

I. THE DETERMINATION OF THE APPELLATE DIVISION THAT AN INTERSTATE COMPACT AGENCY MAY BE REGULATED BY THE LEGISLATION OF ONE PARENT STATE IN THE ABSENCE OF CONCURRENCE BY ALL OTHER PARENT STATES IS CONTRARY TO THE CONTRACTUAL NATURE OF INTERSTATE COMPACT AGENCIES.

This case presents an issue of federal law under the United States Constitution that has national importance since it concerns the circumstances under which a Compact Clause agency may be regulated by the law of one compacting State in the absence of concurrence by the other State or States who are party to the compact. The issue is one which is "the function and duty of the Supreme Court of the Nation" to determine, *State ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951), since it "determine[s] the nature and scope of obligations as between States." *Id.*

The Appellate Division, has ruled that, despite provisions in the DRPA Compact granting authority to its Commissioners to control terms and conditions of the DRPA's employees, subject to gubernatorial veto, N.J. Stat. Ann. §32:3-4 (West Supp. 1999); Pa. Stat. Ann. tit. 36, §3503, Art. III (Supp. 2000), the DRPA must submit labor disputes to binding arbitration under New Jersey law, even though there has been no mutual expression of intent to do so by both New Jersey and Pennsylvania, New Jersey's partner in creating the DRPA. This determination impacts upon the essential nature of Compact Clause entities, as determined by this Court. As set forth more fully herein, this Court has characterized interstate compacts as

binding contracts, and interstate compact agencies as entities created to address issues that transcend state boundaries which are not subject to the unilateral control of one state.

It is respectfully submitted that this Court should review the Appellate Division decision because of the decision's impact on the contractual nature of the DRPA Compact and interstate compacts in general, including those creating the *Amici Curiae*.

A. INTERSTATE COMPACTS ARE CONTRACTUAL IN NATURE AND INTERSTATE COMPACT AGENCIES SHOULD NOT BE REGULATED BY THE LEGISLATION OF ONE PARENT STATE IN THE ABSENCE OF CONCURRENCE BY ALL OTHER PARENT STATES.

In *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30 (1994), this Court recognized that bi-state entities are created by interstate compact "to address interests and problems that do not coincide nicely either with the national boundaries or with State lines - interests that may be badly served or not served at all by the ordinary channels of National or State political action." *Id.*, at 40 (internal quotation marks and citation omitted). A hallmark of an interstate compact agency is that it is not subject to the unilateral control of any of its parent states. "It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States . . . can be unilaterally nullified, or given final meaning by an organ of one of the contracting States." *State ex rel. Dyer v. Sims*, *supra*, at 28. "[B]i-state agencies created by compact . . .are not subject to the unilateral control of any one of the States that compose the federal system." *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. at 42. "[N]o one state alone can control the course of a Compact Clause entity." *Id.*, at 47. By creating an interstate compact entity, each compacting state shifts a part of its authority to the jointly created agency. *Id.*, at 42.

In contrast, in the instant case, the Appellate Division did not respect the contractual nature of the DRPA compact. The Appellate Division did not base its decision on a finding that the New Jersey and Pennsylvania had *expressed* a *mutual* intent to alter the relationship between the DRPA and its employees. Rather, the court relied on each state's *respective* policy as to government labor relations *in general*. Appendix, 14a.[3] Neither state statute relied upon refers to the DRPA. Accordingly, it cannot be said that these two laws purport to amend the DRPA's Compact, or overturn or preempt the Compact provision entrusting the DRPA Commissioners with fixing and determining the "qualifications, duties and compensation" of DRPA employees subject to gubernatorial review

B. THE COMPACT LEGISLATION GOVERNING PETITIONER AND *AMICI CURIAE* REQUIRE CONCURRENT LEGISLATION OF THE RESPECTIVE PARENT STATES TO AFFECT PETITIONER AND *AMICI CURIAE*.

The decision of the Appellate Division is inconsistent with the interstate compacts creating DRPA and the *Amici Curiae*, and subsequent legislation of the parent states imposing duties and obligations on those entities, which require legislation by *both* respective parent states for the legislation to be effective.

1. DRPA LEGISLATION

The DRPA is a typical interstate compact agency. The DRPA was created by interstate compact between New Jersey and Pennsylvania to develop, operate and maintain interstate transportation and port facilities that serve the two States. N.J. Stat. Ann. §32:3-1, -2 (West 1990 & Supp. 1999), Pa. Stat. Ann. tit. 36, §3503, Preamble, Art. I (Supp. 2000), to effect the two States' mutual interest in "development of the Delaware river from Camden and Philadelphia to the sea," through " a

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[3] References to "Appendix" followed by page numbers are to the Appendix to the Petition for Certiorari.

single agency of both states empowered to further the interests of both states." N.J. Stat. Ann. §32:3-1 (West 1990); Pa. Stat. Ann. tit. 36, §3503, Preamble (Supp. 2000).

To facilitate the DRPA's interstate mission, the DRPA Compact and bi-state implementing legislation set forth detailed provisions for *bi-state* governance of the DRPA. The Compact and the implementing legislation do not provide for the imposition of obligations by only *one* of the compact states. The DRPA is controlled by sixteen Commissioners, eight from New Jersey and eight from Pennsylvania. N.J. Stat. Ann. §32:3-3 (West Supp. 1999); Pa. Stat. Ann. tit. 36, §3503, Art. II (Supp. 2000). The Commissioners "have charge of the commission's property and affairs . . . , but no action of the Commissioners shall be binding unless a majority of the members of the commission from Pennsylvania and a majority of the members of the commission from New Jersey shall vote in favor thereof." N.J. Stat. Ann. §32: 3-4 (West Supp. 1999); Pa. Stat. Ann. tit. 36, §3503, Art. III (Supp. 2000). The DRPA Commissioners are specifically granted the power to "fix and determine" the DRPA's employees' "qualifications, duties and compensation." N.J. Stat. Ann. §32:3-5(e) (West Supp. 1999); Pa. Stat. Ann. tit. 36, §3503, Art. IV, para. (e) (Supp. 2000). The Compact provides that the Governor of the State that appoints a Commissioner may be granted the authority to in effect, "cancel" the Commissioner's vote. N.J. Stat. Ann. §32:3-3 (West 1990); Pa. Stat. Ann. tit. 36, §3503, Art. II (Supp. 2000). No provision of the Compact allows the legislature of either State to impose additional duties or obligations on the DRPA, but "additional powers" may granted to the DRPA by *concurrent* legislation of the two States. N.J. Stat. Ann. §32:3-5 (West Supp. 1998); Pa. Stat. Ann. tit. 36, §3503, Art. IV, follow'g para. (q) (Supp. 2000).

The DRPA Compact and amendatory and supplementary legislation are replete with references to the necessity of concurrent legislation by the sister state before any law imposing duties or obligations on the DRPA is effective or operable. *See*, N.J. Stat. Ann. §32:3-2 to -5, -13, -13.23 (West

Supp. 1999) (historical notes); N.J. Stat. Ann. §32:3-13.41, -13.49 (West 1990); N.J. Stat. Ann. §32:4-6 (West 1990 & Supp. 1999) (historical note); N.J. Stat. Ann. §32:4-9 (West 1990); Pa. Stat. Ann. tit. 36, §3503-3503.9 (Supp. 2000) (historical notes); Pa. Stat. Ann. tit. 36, §3504.1-3504.1a (Supp. 2000) (historical notes).

The Appellate Division's determination ignores the subtle balance of power between the executive and legislative branches of state government embodied in the DRPA Compact, and thus ignores the important public policy of insulating interstate compact agencies from unilateral state legislation inconsistent with the agency's independence from single state legislative control. Indeed, as set forth in the DRPA Compact, protection from unilateral state control is the rationale for creating an interstate compact agency to be able to competently address and solve problems of a regional nature which cross state lines. N.J. Stat. Ann. §32:3-1 (West 1990); Pa. Stat. Ann. tit. 36, §3503, Preamble (Supp. 2000).

2. PORT AUTHORITY LEGISLATION

The *Amici Curiae* similarly were created to serve the mutual interests of the compacting States of New Jersey and New York to address common problems.

The Port Authority was created in recognition of the fact that "the territory in and around the port has become commercially one center or district." N.J. Stat. Ann. §32:1-1 (West 1990); N.Y. Unconsol. L. §6401 (McKinney 1979).

A review of the Port Authority Compact demonstrates that the legislatures of the two States intended that the Port Authority be free from obligations or duties imposed by unilateral state legislation of either state and subject only to concurrent legislation. For instance, Article III provides that the Port Authority

> shall be a body corporate and politic, having the powers of jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the Legislature of either State *concurred in by the Legislature of the other* or by Act or Acts of Congress, as hereinafter provided.

N.J. Stat. Ann. §32:1-4 (West 1990); N.Y. Unconsol. §6404 (McKinney 1979) (emphasis added).

Similarly, Article VII of the Compact provides in pertinent part:

> The port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state *concurred in by the legislature of the other*.

N.J. Stat. Ann. §32:1-8 (West 1990); N.Y. Unconsol. §6408 (McKinney 1979) (emphasis added).

As is the case of the DRPA, state control over the Port Authority is accomplished through mechanisms expressly set forth in the Compact itself, not through unilaterally enacted single state legislation. As this Court stated in *Hess*:

> Twelve Commissioners, six selected by each State, govern the Port Authority. See N.J. Stat. Ann. §§32:1-5, 32:12-3 (West 1990); N.Y. Unconsol. Laws §6405 (McKinney 1979); 1930 N.Y. Laws, ch. 422, §6. Each State may remove, for cause, the commissioners it appoints. See N.J. Stat. Ann.§§32:1-5, 32:12-5 (West 1990); N.Y. Unconsol. Laws, §6405 (McKinney 1979); 1930 N.Y. Laws, ch. 422, §4. Consonant with the Authority's geographic domain, four of New York's six Commissioners must be resident voters of New York City, and four of New Jersey's must be resident voters of the New Jersey portion of the Port of New York District.

See N.J. Stat. Ann. §+ (West 1990); N.Y. Unconsol. Laws §6405 (McKinney 1979).

> The Governor of each State may veto actions of the Port Authority Commissioners from that State, ... See N.J. Stat. Ann. §§32:1-17, 32:1-35.61, 32:2-6 to 32:2-9 (West 1990); N.Y. Unconsol. Laws §§6417, 6612, 7151-7154 (McKinney 1979). *Acting jointly, the state legislatures may augment the* powers and *responsibilities of the Port Authority*, see N.J. Stat. Ann. §32:1-8 (West 1990); N.Y. Unconsol. Laws §6408 (McKinney 1979), and specify the purposes for which the Port Authority's surplus revenues are used. See N.J. Stat. Ann. §32:1-142 (West 1990); N.Y. Unconsol. Laws §7002 (McKinney 1979).

502 U.S. at 36 (emphasis added).

Again, as is the case with the DRPA, the Port Authority Compact and its supplements and amendments are replete with references to the necessity of concurrent legislation by the sister state before any law imposing duties or obligations on the Port Authority is effective. The laws of New York and New Jersey imposing obligations on the Port Authority are, by their express terms, only effective upon the enactment of identical legislation by the sister state. *See*, N.J. Stat. Ann. §32:1-35.17 (West 1990); N.Y. Unconsol. L. §6647 (McKinney 1979); N.J. Stat. Ann. §32:1-35.27a (West 1990); N.Y. Unconsol. L. §6631 (McKinney Supp. 1999) (historical note); N.J. Stat. Ann. §32:1-35.36 (West 1990); N.Y. Unconsol. L. §6678 (McKinney 1979); N.J. Stat. Ann. §32:1-35.68 (West 1990); N.Y. Unconsol. L. §6601 (McKinney 1979) (historical note); N.J. Stat. Ann. §32:1-35.93 (West 1990); N.Y. Unconsol. L. §7192 (McKinney 1979); N.J. Stat. Ann. §32:1-119.3 (West 1990); N.Y. Unconsol. L. §6525 (McKinney 1979) (historical note); N.J. Stat. Ann. §32:1-140 (West 1990); N.Y. Unconsol. L. §6525 (McKinney 1979); N.J. Stat. Ann. §32:1-140.7 (West 1990); N.Y. Unconsol. L. §7058 (McKinney 1979); N.J. Stat. Ann. §32:1-146 (West 1990); N.Y. Unconsol. L. §6973

(McKinney 1979); N.J. Stat. Ann. §32:1-154.17 (West 1990); N.Y. Unconsol. L. §6817 (McKinney 1979); N.J. Stat. Ann. §32:1-154.24 (West 1990); N.Y. Unconsol. L. §6837 (McKinney 1979); N.J. Stat. Ann. §32:1-156 (West 1990); N.Y. Unconsol. L. §6932 (McKinney 1979); N.J. Stat. Ann. §32:1-168 (West 1990); N.Y. Unconsol. L. §7112 (McKinney 1979); N.J. Stat. Ann. §32:1-174 (West 1990); N.Y. Unconsol. L. §7136 (McKinney 1974); N.J. Stat. Ann. §32:1-176 (West 1990); N.Y. Unconsol. L. §7142 (McKinney Supp. 1999).

3. WATERFRONT COMMISSION LEGISLATION

The nature and structure of the Waterfront Commission is similar in material respects to the DRPA and the Port Authority. The Waterfront Commission was created by interstate compact for the purpose of eliminating racketeering and other criminal, corrupt and evil conditions on the waterfront within the Port District created by the Port Authority legislation. N.J. Stat. Ann. §32:23-2 to -4, -6 (West 1990); N.Y. Unconsol. L. §§9802-3, 9806 (McKinney 1979). Amendments and supplements to the Waterfront Commission Compact may be adopted only by the action of the Legislature of either State concurred in by the Legislature of the other. N.J. Stat. Ann. §32:23-70 (West 1990); N.Y. Unconsol. L. §9870 (McKinney 1979). The legislation provides that the Waterfront Commission shall enjoy the powers and have the duties imposed on it by the creating legislation and "such additional powers and duties as may hereafter be delegated to and imposed upon it from time to time by the action of the Legislature of either State *concurred in by the Legislature of the other*." N.J. Stat. Ann. §32:23-11 (West 1990); N.Y. Unconsol. L. §9811 (McKinney 1979) (emphasis added). The Waterfront Commission consists of two members. The governor of each state appoints a single Commissioner for a three-year term with the advice and consent of the respective state Senate. N.J. Stat. Ann. §32:23-8 (West 1990). The Waterfront Commission may act only by unanimous vote, *i.e.*, by the votes of the Commissioners from both States.. N.J. Stat. Ann. §32:23-9 (West 1990).

Changes in the powers and duties of the Waterfront Commission have been attempted or accomplished only through concurrent legislation of the two states. In creating the Waterfront Commission, each state provided that only a single state agency was created if the other state did not adopt concurring legislation creating a bi-state agency. N.J. Stat. Ann. §32:23-78 (West 1990); N.Y. Unconsol. L. §9931 (McKinney 1979). A 1970 effort of the two states to expand the jurisdiction of the Waterfront Commission to include air freight activity by amendatory legislation did not become effective because the legislation provided that it would not be effective if not approved by Congress, and Congress has not approved such legislation. Significantly, the legislation adopted by each state also provided that legislation *would not be effective if not adopted by the other state*. See note under N.J. Stat. Ann. §32:23-6 (West 1990) (second version). The states *have* affected the power of the Waterfront Commission by other, less far-reaching legislation. In each instance, this was accomplished by legislation which was effective only after the adoption of identical legislation by the other state. *See*, N.J. Stat. Ann. §32:23-23.1 (West Supp. 1999) (historical note); N.J. Stat. Ann. §32:23-75 (West 1990) (historical note); N.J. Stat. Ann. §32:23-77 (West 1990) (historical note); N.J. Stat. Ann. §32:23-84 (West 1990); N.J. Stat. Ann. §32:23-85 to -86 (West 1990) (historical notes); N.J. Stat. Ann. §32:23-104 (West 1990); N.J. Stat. Ann. §32:23-105.1 (West Supp. 1999) (historical note); N.J. Stat. Ann. §32:23-108 (West 1990); N.J. Stat. Ann. §32:23-113 (West 1990); N.J. Stat. Ann. §32:23-114 (West 1990 & Supp 1999) (historical note); N.J. Stat. Ann. §32:23-117 (West 1990); N.Y. Unconsol. L. §9907 (McKinney 1979) (historical note); N.Y. Unconsol. L. §9920 (McKinney Supp. 1999) (historical note); N.Y. Unconsol. L. §9922 (McKinney Supp. 1999) (historical note); N.Y. Unconsol. L. §9924 (McKinney Supp. 1999) (second version) (historical note); N.Y. Unconsol. L. §9925 (McKinney Supp. 1999); N.Y. Unconsol. L. §9937 (McKinney 1979).

* * * * *

In imposing the obligation to engage in interest arbitration upon the DRPA, the Appellate Division relied on statutes

containing different provisions of the respective states that do not refer to the DRPA. *A fortiori*, these statutes do not reflect a concurrence by the States of New Jersey and Pennsylvania that the DRPA's Compact should be amended to overturn or preempt the compact provision entrusting the DRPA Commissioners with fixing and determining the "qualifications, duties and compensation of DRPA employees subject to gubernatorial review.

Thus, the decision of the Appellate Division is inconsistent with the contractual nature of interstate compacts such as the ones creating DRPA and the *Amici Curiae*, the statutory schemes providing for concurrence in legislation imposing additional obligations on such entities, and the subsequent legislation of the parent states confirming the need for such concurrence. Accordingly, this Court should review the decision of the Appellate Division to address this matter concerning State interaction under the Compact Clause. *State ex rel. Dyer v. Sims, supra*, at 28.

II. THE DETERMINATION OF THE APPELLATE DIVISION THAT AN INTERSTATE COMPACT AGENCY MAY BE REGULATED BY THE LEGISLATION OF ONE PARENT STATE IN THE ABSENCE OF MUTUAL CONCURRENCE BY ALL PARENT STATES IS CONTRARY TO THE LAW OF NEW JERSEY'S PARTNER STATES IN CREATING PETITIONER AND THE *AMICI CURIAE*.

In contrast to the New Jersey courts, the courts of New York and Pennsylvania, New Jersey's partner in creating the Port Authority and the Waterfront Commission on one hand, and in creating the DRPA on the other, have held that an interstate compact agency is not affected by legislation of the parent states unless those states manifest a mutual intent to affect the agency.

The New York Court of Appeals has specifically rejected the proposition that parallel public policies of compacting states reflected in general legislation imposes obligations on an interstate compact agency. Rather, the court recognized that to affect a Compact Clause entity, the parent states must adopt concurrent statutes, which, by express terms, apply to an interstate compact agency.

In *Malverty v. Waterfront Comm'n*, 71 N.Y.2d 977, 529 N.Y.S.2d 67, 524 N.E.2d 421 (1988), the New York Court of Appeals held that Article 23-A of the Correction Law of the State of New York, prohibiting discrimination against persons previously convicted of a criminal offense, did not apply to the Waterfront Commission's occupation licensing functions. In so holding, the court relied on the fact that Article 23-A made no reference to the Waterfront Commission, did not provide that the Waterfront Commission Compact was amended or supplemented and did not state that its provisions would take effect upon the enactment of identical legislation by New Jersey. Id., at 980, 529 N.Y.S.2d at 68, 524 N.E.2d at 422. Significantly, the Court of Appeals found it irrelevant that New Jersey had enacted a similar statute prohibiting discrimination against persons convicted of crimes, *Id.*

The approach taken in *New York* is also taken in Pennsylvania, New Jersey's contractual partner in creating the DRPA. In *Nardi v. Delaware River Port Authority*, 88 Pa. Commw. 558, 490 A.2d 949 (1985), the court refused to apply similar statutes of both states to the DRPA because "neither creator state can unilaterally impose additional duties, powers or responsibilities upon the [DRPA]." *Id.*, at 560, 490 A.2d at 950. A unilaterally enacted Pennsylvania law provided that DRPA was to pay a disabled police officer his or her full salary during the full period of disability. *Id.*, at 561, 490 A.2d at 950. A unilaterally enacted New Jersey statute provided that the DRPA "may pay" a disabled employee his or her full salary for up to one calendar year of disability. *Id.*, at 562, 490 A.2d at 951. Despite the fact that the statutes were, by their terms, expressly applicable to the DRPA, the Pennsylvania court held

the statutes must be denied effect as unilateral legislation restricting a power already possessed by the Authority. *Id.*, at 565, 490 A.2d at 952. The court stated that the parent states of the DRPA could only benefit DRPA employees if it were clear that the legislatures of the two States intended to confer that benefit on DRPA employees. *Id.*, at 564 n.10, 490 A.2d at 952 n.10.

Thus, New York and Pennsylvania acknowledge the contractual nature of an interstate compact by requiring expressions of mutual intent by the parent states as a basis for regulation of an interstate agency's conduct.

In contrast, in the instant case, the Appellate Division did not respect the contractual nature of the DRPA compact. The Appellate Division did not base its decision on a finding that the New Jersey and Pennsylvania had *expressed* a *mutual* intent to alter the relationship between the DRPA and its employees. Rather, the court relied on each state's respective policy as to government labor relations *in general.* Appendix 12a, 14a.

Thus, the approach taken by the Appellate Division is markedly different from that of the courts of New Jersey's partners in creating the DRPA, the Port Authority and the Waterfront Commission.

III. REVIEW OF THE APPELLATE DIVISION DECISION IS NECESSARY TO AVOID CONFUSION AS TO THE STATE LAW APPLICABLE TO INTERSTATE COMPACT AGENCIES BECAUSE OF CONFLICTS AMONG THE COURTS OF THE STATES WHO ARE PARTY TO THE COMPACTS CREATING THE DRPA AND THE *AMICI CURIAE* WITH RESPECT TO WHETHER MUTUAL CONCURRENCE IS NECESSARY FOR INTERSTATE COMPACT AGENCIES TO BE REGULATED BY GENERALLY APPLICABLE STATE LAW.

Review by this Court of the decision of the Appellate Division is necessary to resolve confusion as to the law applicable to interstate compact agencies. The rule of decision of the Appellate Division, that the law of a parent state of an interstate compact agency applies to that agency when the other parent state or states have adopted similar laws of general applicability evincing the same public policy, generates confusion as to the law applicable to DRPA, the *Amici Curiae*, and other interstate compact agencies created by New Jersey and other states.[4] This confusion has two sources. First, the rule used to determine which state legislation applies to a New Jersey interstate compact agency varies from state to state. Second, the rule followed by the Appellate Division itself engenders confusion as to the law applicable to interstate compact agencies.

First, in the absence of review of the Appellate Division decision by this Court, courts of different jurisdictions that have no common reviewing court will resolve differently the question of which legislation of the parent states of an interstate compact agency are applicable to that agency.

Various courts with jurisdiction over the DRPA and the *Amici Curiae* follow different rules of decision as to which legislation of the parent states of an interstate compact agency are applicable to that agency. The rule applied by the Appellate Division, *i.e.*, that an interstate compact agency may be

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[4] The following is a list of interstate compact agencies formed by New Jersey and other states in addition to DRPA and the *Amici Curiae*: Delaware River Joint Toll Bridge Commission (Title 32 N.J. Stat. Ann., Ch. 8 (West 1990)), Delaware River and Bay Authority (Title 32 N.J. Stat. Ann., Ch. 11E (West 1990)), Palisades Interstate Park Commission (Title 32 N.J. Stat. Ann., Ch. 14 (West 1990)), Interstate Sanitation Commission (Title 32 N.J. Stat. Ann., Ch. 19 (West 1990)), Delaware River Basin Commission (Title 32 N.J. Stat. Ann., Ch. 20 (West 1990)), Atlantic States Marine Fisheries Commission (Title 32 N.J. Stat. Ann., Ch. 21 (West 1990)), Tri-State Regional Planning Commission (Title 32 N.J. Stat. Ann., Ch. 22B (West 1990)), Delaware Regional Planning Commission (Title 32 N.J. Stat. Ann., Ch.27 (West 1990)), Mid-Atlantic States Air Pollution Control Commission (Title 32 N.J. Stat. Ann., Ch. 29 (West 1990)).

regulated by the legislation of a parent state if complementary and parallel legislation exists in all parent states, has been followed in New Jersey since *Int'l Union of Operating Engineers, Local 68 v. Delaware River and Bay Authority*, 147 N.J. 433, 688 A.2d 569, *cert. denied*, 522 U.S. 861 (1997). As set forth above, New York and Pennsylvania state courts reject the rule, as have federal courts of United States. Federal courts in New York and Pennsylvania have also rejected New Jersey's rule of decision. *Dezaio v. Port Authority*, 205 F.3d 62 (2d Cir. 2000), rejected the claim that New York Human Rights Law applies to the Port Authority. Citing the *Hess* decision of this Court, the Second Circuit ruled that the enactment of general legislation by the Port Authority's parent States prohibiting employment discrimination was not sufficient to render that legislation applicable to the Port Authority, and applying that legislation to the Port Authority in the absense of the States' mutual concurrence would violate the Port Authority Compact. *Id.* at 65, 66. *Pilla v. Delaware River Port Authority*, 1999 WL 345918 (E.D. Pa. May 7, 1999), rejected a claim that Pennsylvania's Human Relations Act governs the actions of DRPA because New Jersey's Law Against Discrimination prohibits discrimination in employment and is thus similar. The court specifically rejected the New Jersey test that the laws of an interstate agency's parent states are applicable to the agency if the state's laws are "substantially similar". *Id.*, at *4.

Hence, whether the rule followed by the Appellate Division will be applied to an interstate compact agency *will vary depending on the forum in which the suit is heard.*

Moreover, although the current conflict exists across state lines, there is the potential the conflict will exist within New Jersey itself. Interpretation of an interstate compact is a question of federal law. *See*, *Cuyler v. Adams*, 449 U.S. 433, 438 (1981); *Delaware River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419, 427-28 (1940). Thus, a federal district court in New Jersey need not follow the New Jersey state court's resolution of the issue. Indeed, unless such a court rendered a decision contrary to other federal courts and that of neighbor states, a federal

court in New Jersey *would* create a conflict between New Jersey federal courts and New Jersey state courts on the issue[5]

This Court is the only court with the jurisdiction to resolve the conflict. *State ex rel, Dyer v. Sims, supra*, at 29.

In the absence of resolution of the issue by this Court, New Jersey interstate agencies, and other interested parties, have no means of ascertaining how the laws of a single state will apply to such agencies. A plaintiff could recover against an interstate compact agency under state law in New Jersey, but not under the "similar law"of the other parent state or states. *King v. Port Authority, supra*, n.5, at 946.

In addition, the rule adopted in New Jersey is itself a source of confusion. No genuine guidance is given as to how to identify similar legislation with similar purposes that may be applied to interstate compact agencies in the absence of mutual legislation expressions by parent states of application to an affected agency. In this case, the Appellate Division found sufficient similarity to apply the two State statutes to the DRPA despite significant differences in those statutes. Appendix, 12a-14a. The Appellate Division held that the two States' sharing of a policy that public employees are entitled to engage in collective negotiation is sufficient to render the two States' statutes complementary and parallel so that they may regulate the DRPA's conduct. *Id.* at 14a. However, identification of

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[5] In *King v. Port Authority*, 909 F. Supp. 938 (D.N.J. 1995), *aff'd*, 106 F.3d 385 (1996), a New Jersey federal court reached a decision contrary to that of the Appellate Division. However, *King* was decided prior to the decision of the New Jersey Supreme Court in *Int'l Union of Operating Engineers, Local 68 v. Delaware River and Bay Authority, supra*. *King* relied in part on New Jersey precedent prior to that decision, concluded that New Jersey courts would follow the rule that legislation of the parent states of the Port Authority apply to the agency *only* if the two states have concurrently adopted the legislation, or the two states have adopted similar legislation which purport to apply to the Port Authority, and followed that rule in holding that the New Jersey Law Against Discrimination does not apply to the Port Authority irrespective of the existence of a New York anti-discrimination law, the New York Human Rights law. 909 F. Supp. at 943- 46.

similarity in abstract public policies cannot serve as an effective guide to interested parties to distinguish those state laws which apply to interstate compact agencies without the concurrence of the partner state or states, and which do not. At a sufficiently high level of abstraction, all states share some common policy on public issues. For example, all tort law is intended to compensate the injured without placing a undue burden on potential defendants; all public employee labor law is intended to preserve labor peace, provide services to state residents, and deal fairly with employees. Moreover, such an approach can cause confusion as to the contour of the law to be applied. In *Int'l Union of Operating Engineers, Local 68 v. Delaware River and Bay Authority*, *supra*, the New Jersey Supreme Court made no attempt to address the mechanics of requiring the Delaware River and Bay Authority, a Delaware-New Jersey interstate compact agency, to negotiate with a union in the absence of an administrative agency designated by law to resolve labor disputes, relying on the ability of the Superior Court, Chancery Division, "to interpret labor law," without addressing how any differences in Delaware and New Jersey labor law would be resolved. *Id.* at 448, 688 A.2d at 576.

Issuance of a writ of *certiorari* by this Court, and a determination that, pursuant to the contractual nature of interstate compact agencies, concurrence of an interstate compact agency's parent states is necessary for state law to be applicable to that agency, would provide a basis for parties to distinguish between state law to be applicable to an interstate compact agency, and state law that is not.

Thus, review of the Appellate Division's decision by this Court would resolve two types of confusion as to state law to be applicable to an interstate compact agency engendered by the New Jersey rule.

CONCLUSION

For the foregoing reasons, *Amici Curiae* the Port Authority and the Waterfront Commission respectfully request that the Court grant the DRPA's Petition for Certiorari.

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